United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4272

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SAMUEL LIEFER and HARRY OSTREICHER, a co-partnership, d/b/a RIVER MANOR HEALTH RELATED FACILITY, and LOCAL 531, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT RIVER MANOR HEALTH RELATED FACILITY

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Counterstatement of the Issues Presented

1. Whether the Board erred in finding that River Manor is responsible for the actions and conduct of the LPN's?

2. Whether the Board erred in finding that River Manor discharged employees Brenda Frazier, Albert Hazell, and Mary Terrell because of their activities on behalf of Local 144?

Counterstatement of the Case

A. Nature of the Proceedings.

Respondent, Samuel Liefer and Harry Ostreicher, a copartnership doing business as River Manor Health Related Facility, operates a nursing home in Brooklyn, New York.

Between January 14, 1975 and April 16, 1975 various charges were filed with the National Labor Relations Board by Local 144, Hotel, Hospital, Nursing Home and Affiliated Health Services Union, affiliated with Service Employees International Union, AFL-CIO (hereinafter "Local 144") and Local 1115, Joint Board, Nursing Home and Hospital Employees Division (hereinafter "Local 1115") alleging the commission by Respondent of certain unfair labor practices in violation of Section 8(a)(1)(2)(3) and (4) of the National Labor Relations Act, as amended, 29 U.S.C. Sections 151, *et seq.* (hereinafter "The Act"). The Regional Director subsequently issued a consolidated complaint based upon the charges filed.

B. The Administrative Law Judge Found Section 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1)(A) and 8(b)(2) Violations After the Hearing.

A hearing was held before Administrative Law Judge Julius Cohn (hereinafter "The Judge") on June 16, 17, 18, and 19, 1975 and July 14, 15, and 16, 1975. From the outset of the trial, the charging Union's and the General Counsel's position was that River Manor's extension of recognition to Local 531 was not effected with knowledge of any organizing by a competing labor organization and thus was not in contravention of the Board's doctrine enunciated in *Midwest Piping and Supply Co.*, 63 NLRB

1060 (1945) (A. 20, 10-11).[1] After eliminating this issue from the case, the Administrative Law Judge went on to rule, by decision issued January 30, 1976, that River Manor had nonetheless given assistance and support to Local 531 in violation of both Sections 8(a)(1) and 8(a)(2) by virtue of the actions and conduct of its LPNs.[2] In addition to these pre-recognition violations, the Judge also found certain post-recognition violations, premised on the unlawfulness of extending exclusive recognition to Local 531 at a time where it did not represent an 'uncoerced' majority of its employees.[3] The Union, in turn, was held to

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[1] References contained in parentheses are to the Joint Appendix herein. "GCX", "RX", and "PIX" indicate Exhibits, not reproduced in the appendix but 'lodged' with the Court, which were introduced by the General Counsel, River Manor, and Local 531, respectively.

[2] The Conclusions of Law of the Administrative Law Judge with respect to pre-recognition violations are as follows:

> "3. . . . By permitting representatives of Respondent Union on company premises during company time, by otherwise assisting Respondent Union in obtaining union authorization cards from its employees; by causing membership cards in Respondent Union to be solicited by its employees. Respondent River Manor further violated Section 8(a)(2) of the Act."
>
> "7. By promising benefits to induce employees to join and threatening employees with loss of employment should they fail to become members of Respondent Union, Respondent River Manor violated Section 8(a)(1) of the Act." (A. 28-29)

[3] The Judge's Conclusions of Law with respect to post-recognition violations are:

> "3. By recognizing and bargaining with Respondent Union on and after December 9, 1974, when Respondent Union did not represent an uncoerced majority of its employees, Respondent River Manor has violated Section 8(a)(1) and (2) of the Act. . . .
>
> 4. By seeking to enforce a provision in said recognition agreement that a union security clause be included in any collective bargaining agreement thereafter negotiated in such manner as to require employees to sign dues checkoff cards on

have violated Section 8(b)(1)(A) by entering into the recognition agreement and 8(b)(2) and 8(b)(1)(A) by including in said recognition agreement a provision that a future collective bargaining agreement contain a union security clause, as well as by maintaining and enforcing that provision so as to require employees to sign dues deduction authorization cards.

Lastly, it was found that River Manor violated Section 8(a)(3) by discharging Brenda Frazier, Albert Hazell and Mary Terrell because of their activities on behalf of Local 144.

On March 19, 1976, River Manor filed timely exceptions, to the Administrative Law Judge's decision.

C. A Panel of the Board Adopted the Administrative Law Judge's Decision With Slight Modification.

A panel of the Board affirmed the rulings, findings and conclusions of the Administrative Law Judge except that it declined to rule on the finding that River Manor violated Section 8(a)(3) and that Local 531 violated Section 8(b)(2) by attempting to enforce the recognition agreement. Thus, these violations were eliminated from the case.

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behalf of Respondent Union, Respondent River Manor has violated Section 8(a)(3) of the Act. . . .

6. By refusing access to its premises and employees to Locals 144 and 1115 at a time when it accorded such privileges to Respondent Union, the Respondent River Manor thereby rendered unlawful assistance to Respondent Union in violation of Section 8(a)(2) of the Act." (A. 28-29).

POINT I

The Board Erred in Holding River Manor Responsible for the Actions and Conduct of Nonsupervisory LPNs.

The Board's findings that the Employer violated Sections 8(a)(1) and 8(a)(2) of the Act by assisting Local 531 in obtaining authorization cards and thereafter, by recognizing Local 531 at a time when it did not represent an uncoerced majority of employees, are premised entirely upon the actions of three nonsupervisory LPNs (A. 14, ll. 6-9). Concededly, the Judge found, and the Board adopted his findings, that these LPNs, Mercado, Russell and Link, were not supervisors within the meaning of the Act (A. 7, ll. 15-16). Similarly, the Board adopted the finding that the record was devoid of any "specific evidence that the LPNs were instructed or authorized to engage" in the solicitation of Local 531 authorization cards or to engage in any other proscribed conduct (A. 16, ll. 31-32). However, failing to find either supervisory status or express agency relationship, the Judge, with the Board affirming, seized on the only remaining ground for imputing responsibility for the conduct of the LPNs to the Employer—that of their "strategic position" (A. 16, ll. 14-16). It is respectfully submitted to this Court that there is no basis in fact or law for holding the Employer responsible for the actions of its LPNs. Thus, the Board's finding that the Employer violated Sections 8(a)(1) and 8(a)(2) by rendering unlawful assistance to Local 531 must fall. Similarly, acknowledging that the authorization cards were secured without Employer taint would necessitate a finding that the recognition agreement was legal and binding.[4]

[4] Thus, if the recognition agreement is valid, findings of unfair labor practices based on incidents occurring subsequent to the rec-

A. The Board's Finding of a Section 8(a)(2) Violation, Resting Solely on a Strategic Position Theory, Is Unsupported by Substantial Evidence in the Record.

It is submitted that even under a strategic position theory, there must be specific record evidence that the Employer placed its employees in a strategic position by some overt action which, thereby, led employees to believe that the individuals were spokespersons of management. Review of the record evidence, in light of Court and Board precedent, establishes that no such action ever occurred.

1. The duties and responsibilities of the LPNs cited in support of the Board's findings are merely incidental to an LPNs professional status.

The Administrative Law Judge found that LPNs can be considered an arm of management based upon the following theory:

". . . [B]y virtue of the medical responsibilities the LPN is in a position of directing the aides and orderlies to that extent. When this is coupled with certain

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ognition date must be overturned. The post-recognition incidents alleged as unfair labor practices would be legal because of the valid recognition. Thus, for example, the 8(a)(2) violations premised on River Manor's refusing access to its premises to representatives of Locals 144 and 1115 while it accorded such privileges to Local 531 must be invalidated. The 8(a)(2) and 8(a)(1) violations premised on River Manor's recognizing and bargaining with Local 531 at a time when it did not represent an uncoerced majority of its employees would also be mooted.

However, it is conceded that the validity of the recognition would not alter the status of the 8(a)(2) violation premised on River Manor's requiring employees to sign dues-deduction authorization cards on behalf of Local 531 (A. 38). Yet, as the Judge noted, the "checkoff card" violation occurred only in January, 1975. Thus, accepting the validity of this particular Board conclusion would, in no way, invalidate the recognition agreement signed on December 9, 1974.

> other duties, albeit routine, affecting the working conditions of these employees, it may well be concluded in some case that they may be regarded as an arm of management. Some of these duties in this case include handing out checks; Russell, upon express instruction from Harrington, warning Frazier [sic] and others about lateness; Harrington receives reports from the LPNs as to their performance and work habits; an LPN is authorized to change the work location of an orderly when required; LPNs calling for a replacement as needed; LPNs transmit information from and to Harrington." (A. 16-17).

It is respectfully submitted that not one factor, nor any combination of factors cited, constitute a basis for holding the Employer responsible for the conduct of the LPNs. Virtually all are no more than normal and routine incidents of an LPNs professional status. Thus, in the interest of providing proper patient care, LPNs might assign or direct an aide or orderly (A. 346); change an employee's work location when dictated by patient needs (A. 273-274); call for a replacement pursuant to a listing prepared by the Director of Nursing Services (A. 863-864); and speak to or be spoken to by Harrington, the sole nursing department supervisor, about staff performance (A. 1145).[5]

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[5] Additionally, certain "duties" relied upon by the Board were not exercised by all the LPNs but, rather, were limited to LPN Russell. Thus, the record revealed that only Russell had occasion to hand out checks (A. 799) or warn employees about lateness (A. 797-798). Warning employees about lateness was clearly necessary for the promotion of proper patient care because Harrington, who ordinarily and exclusively handled this matter was not in the facility at night. Russell's handing out of checks was an act designed merely for the convenience of night shift employees who did not work during normal office hours.

a. *The Ninth Circuit has upheld the Board's view that such responsibilities are merely incidental to an LPNs professional status.*

The Board has consistently held that LPNs performing the above duties are employees within the meaning of the Act. *Wing Memorial Hospital Association*, 217 NLRB 1015 (1975); *Madeira Nursing Center*, 203 NLRB 323 (1973); *Leisure Hills Health Centers*, 203 NLRB 326 (1973); *Doctor's Hospital at Modesto, Inc.*, 183 NLRB 950 (1970). Thus in *Doctor's Hospital Of Modesto, Inc.*, 489 F.2d 772 (9th Cir., 1973), the Ninth Circuit affirmed the Board's holding that floor nurses were not supervisors despite the fact that they directed and assigned the aides and orderlies with whom they worked. In recognizing that this direction and assignment was an incident of the nurses' duties as professionals, the Ninth Circuit implicitly adopted the Board's view that:

> [T]he Employer's registered nurses are a highly trained group of professionals who normally inform other, less skilled, employees as to the work to be performed for patients and insure that such work is done. But, *their daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their employer.* 183 NLRB at 951. (Emphasis added.)

Clearly, LPNs not performing these acts would not be performing their job in accordance with the high standards imposed by the profession. As the factors relied on by the Board exist by virtue of the LPNs exercise of their professional skills and not by virtue of the Employer's actions, it cannot be said that the performance

of these duties placed LPNs in a strategic position. In fact, the Judge had specifically concluded that the duties of the LPNs were "routine" in nature (A. 17).

2. *The finding that other employees perceived the LPNs as an arm of management is unsupported by substantial evidence on the record.*

After citing the routine duties of the LPNs, supra, in support of his finding that the Employer placed LPNs in a "strategic position," the Administrative Law Judge concluded:

> "[I]t *may well be concluded* in some cases that the [LPNs] may be regarded as an arm of management . . . These factors lead *me* to conclude that the LPNs appeared to have close ties with management . . ." (A. 17). (Emphasis added.)

However, the Judge failed to cite any record testimony in support of his conclusion. In fact, the record is devoid of any such evidence. Thus, while the *Judge* may have concluded that LPNs were an arm of management the uncontroverted record evidence reveals that the *employees* did not perceive or treat LPNs as an arm of management.[6]

While the Judge repeatedly alluded to alleged solicitations and actions of LPN Russell, the record evidence establishes that employees treated Russell as they would any other employee.

Thus, Albert Hazell, instructed by a New York State Labor Relations Board Agent and a representative of

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[6] While the right to draw inferences is generally within the domain of the trier, that power is not absolute. It is the function of the reviewing Court to scrutinize the record and set aside a decision of the Board where it is based on unreasonable inferences unsupported by the record considered as a whole. *NLRB* v. *Martin A. Gleason*, 534 F.2d 466, 474 (2d Cir., 1976); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951).

Local 144 to solicit cards only from employees (A. 248-249, 274-276), proceeded to ask Russell to sign a Local 144 card (A. 226). Hazell's solicitation of Russell was not accidental; *Hazell testified that he did not consider Russell to be a supervisor or part of management* (A. 275-276).[7]

Still another witness called by General Counsel, aide Fraulein Brown, testified as to Russell's lack of authority over her.

> "Q. When Russel said you were fired, what did you do?
>
> A. I did nothing.
>
> Q. You kept working? You didn't leave the place?
>
> A. No, I didn't. I know she could not fire me. I would have to be told by Miss Harrington that I am fired." (A. 1486)

Similarly, employees did not perceive Russell as a conduit of information. Employees would converse openly about other unions in Russell's presence[8] despite the fact that the employees did not want management to know what they were discussing (A. 259, ll. 1-3).

B. The Board's Conclusion That the Employer Is Responsible For LPN Conduct Is Contrary to Court and Board Precedent.

The factors cited by the Judge and adopted by a panel of the Board, are insufficient under both Court and Board precedent to hold the Employer responsible for the con-

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[7] Hazell's testimony must be accorded great weight as he claimed that his discharge was due to his union activity and therefore, he would have every reason to allege that Russell was a supervisor.

[8] At one such meeting Hazell, Frazer, Williams and Robinson were present. Williams, as a former Local 144 member, was familiar with organizing activities and surely would not have countenanced open discussions in the presence of someone whom he perceived to be a "conduit of information."

duct of the LPNs. The cases relied upon by both the Judge in his decision and the Board in its brief are inapposite and not controlling. In fact, these cases make it abundantly clear that the conduct of employees is not imputable to an Employer merely by virtue of the employees' exercise of routine duties and responsibilities which are not vested in the employees by management. Were it otherwise, it would mean that any time LPNs, along with other employees in a health care facility, attempted to exercise their Section 7 rights by organizing, the Employer could be accused of giving unlawful support to the organizing union simply because of the LPNs' strategic position.

1. ***This Court has held that an Employer should not be held responsible for the organizing activities of its straw bosses.***

In *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir., 1966) this Court reversed the Board's finding that the Employer should be held responsible for the organizing activity of its straw bosses. Specifically, a three member panel of the Board had held that solicitation by a particular employee, Felter, constituted unlawful assistance on the part of the Company in violation of Section 8(a)(2) since Felter was working "in a lead capacity for the general laborers then being hired".

Felter, like the River Manor LPNs (A. 6-7), "was without authority, real or apparent, to hire or fire other employees or to act in any general supervisory capacity on behalf of the Company". He, like the LPNs, received an hourly wage and punched a time clock (A. 6).

His job entailed starting the boiler and compressors when he began work, watching them for an hour or two, and closing them down at the end of the day. "For the

rest of the time he engaged in pipe work as directed by supervisors, being assigned such helpers from one to three or four, as the particular job required. . . . When a supervisor knew he would be late in getting to work, Felter would be told to show two or three of the employees what jobs were to be done."

Clearly, Felter's activities are analogous to those of Mercado, Russell and Link in that they too direct and assign "helpers" (the aides and orderlies).[9]

The Board quickly perceived the analogies as well for just as it found that the Employer was responsible for the actions and conduct of Felter, so too does it attribute the conduct of Russell, Link and Mercado to River Manor.

However, this Court understood well the fatal flaw in the Board's reasoning:

> It is true, as counsel for the Board says, that §8(a)(2) may be violated by organizing activities of an employee in a position of authority for which the employer may fairly be held responsible, even though it has not in fact authorized them and the employee did not have the power to hire or fire. . . . But the reason for this rule, namely, that the rank and file may have just cause to regard such activities as representing the employer's will or desire, . . . *also sets its limits.* And, in practical application, due weight must also be given to competing values; *if (straw bosses) were not to be free to express their opinions and to urge fellow-workmen to organize in a certain way, the interest and activity of the most competent*

[9] See *Doctor's Hospital Of Modesto, Inc., supra,* p. 8 where the Board and Ninth Circuit recognized that it was an incident of a nurses' duties to "inform other, less skilled employees as to the work to be performed for patients and insure that such work is done."

men in the appropriate bargaining group would be eliminated. 355 F.2d at 858. (Emphasis added.)

Thus, it is respectfully submitted to this Court that *Majestic Weaving* compels the same conclusion in the instant case. If the Board's decision is allowed to stand it would mean that henceforth anytime an LPN attempted to exercise his or her statutory right to organize along with other employees in a health care facility, the Employer could and *would* be accused of giving unlawful support to the organizing union because of the LPNs' strategic position. Clearly this is "beyond the limits" set by *Majestic Weaving.* The LPNs must be "free to express their opinions and to urge fellow workmen to organize in a certain way," otherwise the interest and activity of the most competent persons in the appropriate bargaining group would be eliminated.

2. *The Seventh Circuit has held that an Employer should not be held responsible for the organizing activities of its straw bosses.*

In *NLRB* v. *Sinko Manufacturing And Tool Company,* 369 F.2d 226 (7th Cir. 1966) the Seventh Circuit also dealt with the issue of whether or not an employer should be held responsible for the organizing activities of an employee. At issue was the status of one Dewey Carson. The Board had found that he was a supervisor. Thus, because Carson had secured most of the Union's authorization cards, it was found that the Union did not represent an uncoerced majority of Sinko's employees.

The Court denied enforcement on this particular finding. Despite the fact that Carson had been used by his immediate supervisor to transmit management's orders to the other employees, the Seventh Circuit held that Carson was merely a "leadman or straw boss" and thus the Em-

ployer should not be held responsible for his organizing activities.

3. *The cases relied upon by the Board in its Brief to this court do not establish that River Manor should be held responsible for the organizing activities of its LPNs.*

It is respectfully submitted that the cases relied upon by the Board in support of their contention that River Manor was responsible for the actions of its LPNs allegedly employed in "strategic positions" are inapplicable. In certain of the cases, the sole basis for imputing responsibility to the Employer was the supervisory status of the individuals involved. Clearly, these are inapposite. In others, where the "strategic position" theory was discussed, it is submitted that the Employer's acts in cloaking the employees with this "strategic position" were far greater than in the instant case.

Thus, *NLRB* v. *Midtown Service Co.*, 425 F.2d 665 (2d Cir., 1970);[10] *NLRB* v. *A & S Electronic Die Corp.*, 423 F.2d 218 (2d Cir., 1970), *cert. denied*, 400 U.S. 833;[11] *NLRB* v. *Revere Metal Art Co.*, 280 F.2d 96 (2d Cir., 1960), *cert. denied*, 364 U.S. 894,[12] rely upon supervisory status in establishing Section 8(a)(1) and 8(a)(2) violations.

The remaining four cases relied upon by the Board in its brief to this Court present a strategic position theory

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[10] The violation relied on a finding that *supervisors* had both solicited employees to sign petitions for the union and threatened employees with loss of jobs if the Union lost the election. 425 F.2d at 667.

[11] The violation again relied on *supervisory* solicitation of Union authorization cards. 423 F.2d at 221.

[12] Here, the violation rested on the fact that the *plant foreman* presented the cards to employees who were then sent down to him "a couple at a time to get their checks and sign the cards." 280 F.2d at 99.

as grounds for Employer liability. They are *I.A.M.* v. *NLRB*, 311 U.S. 72 (1940); *NLRB* v. *Mississippi Products, Inc.*, 213 F.2d 670 (5th Cir. 1954); *NLRB* v. *Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973); and *NLRB* v. *Broyhill Co.*, 514 F.2d 655 (8th Cir. 1975).

a. *The Supreme Court decision is inapposite.*

The Board places great reliance on the Supreme Court's decision in the *I.A.M.* case. However, it is submitted that the Board's reliance is misplaced. In affirming the Court of Appeal's holding that the Employer was responsible for the actions of four individuals found to be minor supervisory officials of the Employer, the Supreme Court held that they did "exercise general authority over the employees and were in a *strategic position* to translate to their subordinates the policies and desires of the management."

Clearly, an inquiry into what these four individuals actually did, and what they were called, leads to an examination of the Court of Appeals decision that the Supreme Court affirmed. In *I.A.M.* v. *NLRB*, 110 F.2d 24, 43 (D.C. Cir. 1939), Fouts, Bolander, and Shock are termed "minor *supervisory* officials of the company." Thus, Fouts was "assistant foreman" in charge of a department (Id. at 411), Shock acted as foreman for the toolroom day shift (Id. at 36, 43) and Bolander was the foreman in the night shift (Id. at 43). Dininger, too, acted as night foreman in the toolroom and had the authority to "lay off" men (Id. at 42).

It is respectfully submitted that even a cursory comparison of the duties and responsibilities of Mercado, Russell and Link to that of Fouts, Shock, Dininger and Bolander compels the conclusion that Supreme Court case is inapposite. The three LPNs were neither minor super-

visory officials (A. 7, ll. 15-16) nor were they possessed of the authority to "lay off" aides or orderlies (A. 386, 547).

b. *The Fifth Circuit decision is inapposite.*

In *NLRB* v. *Mississippi Products, Inc.*, 213 F.2d 670 (5th Cir. 1954) the Fifth Circuit agreed with the Board's holding that an Employer should be held responsible for the conduct of a nonsupervisory employee relying upon the following factors: (1) The employee, Marron "occupied a private office . . . and until recently the public-address system was operated from it; (2) *it was Marron whom Rutledge selected to make to the employees over the public-address system the antiunion speech of November 9, in which Marron was obviously speaking as the voice of management;* (3) Marron served ostensibly as editor of the Cabineteer [company newspaper]; and (4) Marron was manager of Respondent's athletic teams, composed of the employees."

In addition, . . . Marron was in charge of certain aspects of the [Employer's] personnel relations." Id. at 672 (Emphasis added).

While Marron utilized and controlled two means by which the Employer's antiunion campaign was communicated to the employees, the River Manor situation is devoid of any substantial, unequivocal and overt action of either Russell, Link or Mercado from which the employees could reasonably believe that the LPNs had close ties with management.

c. *The Sixth Circuit decision is inapposite.*

In *NLRB* v. *Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir., 1973), the Sixth Circuit agreed that the Board was justified in concluding that the conduct of two employees, having

close ties with management, was imputable to the Employer. However, in so holding, the Court emphasized that the Employer had openly acquiesced in their anti-union efforts. 474 F.2d at 331. Contrarily, there is no evidence that River Manor ever acquiesced in the LPNs union activities nor that LPNs were carrying out management's instructions (A. 16, ll. 31-35).

d. *The Eighth Circuit decision is inapposite.*

In *NLRB* v. *Broyhill Company,* 514 F.2d 655 (8th Cir., 1975), the Eighth Circuit affirmed the Board's holding that the Employer was responsible for the actions of its "foreman" who it was found was a "supervisor." However the Eighth Circuit Court speculated that even if the "foreman" was not technically a supervisor within the meaning of the Act, it is clear from the evidence adduced "that other employees felt he was their 'boss' and that the Company had placed him in a position where employees could reasonably believe that he spoke and acted on behalf of management." 514 F.2d at 657.

Thus, the Court's "strategic position" theory rests upon factors considered by the Board to be significant; that is, McWilliams made job assignments; he was introduced to employees as the foreman; he arranged work schedules; he criticized and reprimanded employees; and, he wore a helmet with the designation "foreman" imprinted thereon. 210 NLRB at 291, 294.

Clearly the singularly most important factors relied upon to establish Employer responsibility, that is, supervisory status and non-routine duties, are strikingly absent from the pertinent facts of the instant case. Additionally, neither Mercado, Russell or Link were vested with anything like the obvious imprimatur of management which McWilliams wore on his head.

4. The Board's conclusion that the Employer is responsible for the LPN's conduct is contrary to established Board precedent.

The cases relied upon by the Board in its decision make it abundantly clear that the conduct of employees is not imputable to an Employer merely by virtue of the employees' exercise of routine duties and responsibilities which are not vested in the employees by management.

Thus as noted supra pp. 16-17 neither *Mississippi Products, Inc.*, 103 NLRB 1388, enforcement denied 213 F.2d 670 (5th Cir. 1954), *Broyhill Company*, 210 NLRB 288 (1974) affirmed 514 F.2d 655 (8th Cir. 1974) nor *NLRB* v. *Dayton Motels, Inc.*, supra are factually analogous to the instant situation.

Therefore, we submit to this Court that upon a review of the entire record, in light of the relevant Court and Board precedent, substantial evidence does not exist to support the Board's conclusion that River Manor should be held responsible for the actions and conduct of its non-supervisory LPNs.

POINT II

The Discharges of Employees Brenda Frazer, Albert Hazell, and Mary Terrell Were for Cause and Were Nondiscriminatory.

The Employer maintains that Frazer, Hazell, and Terrell were discharged solely for legitimate and compelling business reasons. The courts have long held that the burden of proving that a discharge is unlawful rests on the General Counsel. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB* v. *Patrick Plaza Dodge, Inc.*, 522 F.2d 804, 807 (4th Cir. 1975); *NLRB* v. *Red Top, Inc.*,

455 F.2d 721, 726 (8th Cir. 1972); *NLRB* v. *Consolidated Diesel Electric Company,* 469 F.2d 1016, 1024 (4th Cir. 1972); *NLRB* v. *Winn-Dixie Stores, Inc.,* 410 F.2d 1119, 1121 (5th Cir. 1969); *NLRB* v. *Billen Shoe Co.,* 397 F.2d 801, 803 (1st Cir. 1968); *NLRB* v. *Minnotte Mfg. Corp.,* 299 F.2d 690, 692 (3d Cir. 1962); *NLRB* v. *Office Towel Supply Co.,* 201 F.2d 838, 839 (2d Cir. 1953). Another principle long-embraced by this Court, as well as others, is that an Employer can discharge an employee for any reason whatsoever, so long as it is not motivated by the employee's exercise of his statutory rights. *NLRB* v. *Dorn's Transportation Co.,* 405 F.2d 706, 712 (2d Cir. 1969); *NLRB* v. *Milco, Inc.,* 388 F.2d 133, 138 (2d Cir. 1968); *NLRB* v. *Park Edge Sheridan Meats, Inc.,* 341 F.2d 725, 728 (2d Cir., 1965).

Where the Board's conclusion as to the Employer's motivation is not supported by the evidence, the courts will set aside the Board's finding. Thus, in *NLRB* v. *Office Towel Supply Co.,* supra, where the Board found that an employee was discharged because of her concerted activity, this Court refused to enforce, stating:

> "We find it impossible to accept the Board's conclusion that here the employee was discharged 'because' she 'engaged in concerted activity'. . . . Such a conclusion stretches too far the meaning of 'because.'" 201 F.2d at 840.

Accordingly, it is submitted that the finding that Frazer, Hazell and Terrell were discharged in violation of the Act, is not supported by substantial evidence viewing the record as a whole. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

A. Brenda Frazer Was Discharged Due To Her Continual Lateness and Not, as the Board Erroneously Concluded, Because of Her Union Activities.

1. *Frazer's record prior to her discharge establishes habitual lateness.*

Brenda Frazer was hired, on a trial basis, on October 30, 1974 as a nurses aide assigned to the midnight to eight shift (A. 10, 409).[13] On January 9, 1975, less than two and one half month's later, she was discharged for excessive tardiness.[14]

a. *River Manor's reporting procedure.*

At River Manor, aides and orderlies reporting to work follow a specific sign in routine. Upon entering the premises employees first take their time card and punch in on the timeclock (A. 381). Immediately thereafter, the employees sign the Aides Sign In Book (A. 381, GCX 23). During her brief tenure, Frazer adhered to this reporting procedure (A. 381, 441).

Although an employee might punch and sign in prior to the commencement of his shift, as a practical matter, an employee who reported to work minutes before his shift would not be at his assigned station on time (A. 854). Frazer testified that it took her several minutes to get

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[13] While the Judge found that Frazer was hired on October 30, confusion lingers as to her hire and starting date. On the one hand there is Frazer's application for employment which is dated October 31, 1974 (A. 10). On the other hand, reference to the Aide Sign In Book (GCX 23) reveals that Frazer reported to work as early as October 29th. As Frazer's commencement date is of no import except in computing her lateness, it will be assumed that the Judge's finding is accurate.

[14] The Consolidated Complaint alleged that Frazer was discharged on January 10, 1975. However, despite the record evidence to the contrary, the Judge found that Frazer was discharged on the 10th. See p. 24 infra.

from the timeclock, located on the first floor, to her work station on the second floor (A. 381-382). Thus, to be completely accurate in computing the total number of times Frazer reported late to work one would have to include those days on which she reported to work at 11:58 P.M. or later.[15] Nevertheless, Harrington testified that in arriving at her decision to terminate Frazer for excessive lateness she counted only those times that Frazer signed in at midnight or later (A. 856-857). The record evidence shows that Frazer reported to work late on twenty-six (26) of the fifty days that she was employed at River Manor (A. 383, 390, GCX 23).[16]

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[15] The Aide Sign In Book reveals that Frazer reported to work between 11:58 p.m. and midnight five times in the course of her employment.

[16] Frazer gave several affidavits to the Board agent investigating the charges (A. 379-380). In those statements she claimed that she was late only seven times. On cross-examination, Frazer admitted that she had been late in excess of thirty times (A. 390-391). This is but one instance of Frazer's unreliability as a witness.

Frazer's affidavits to the Board are reflective not only of her incredibility as a witness but also of the incredibility of the charges which she filed. The Record evidence establishes that Frazer and Hazell had gone to the New York State Labor Relations Board on January 9 (A. 219-220, 367). A Board agent told them that if they were discharged or otherwise discriminated against because of their union activities their jobs would be protected. Thus, with the mistaken belief that an assertion of union activity would result in her rehire, Frazer concocted a story which would blame her discharge on her union activity. That fabrication was Frazer's purpose is evidenced by the fact that she repeatedly minimized the number of lateness which were in fact the cause of her discharge.

2. *Substantial evidence on the record does not support the Board's conclusion that Frazer was discharged because of her Union activity.*

a. *The Judge completely ignored the egregious nature of Frazer's lateness.*

Examination of the record evidence establishes the extremely serious nature of her tardiness problem. The Judge completely ignored this evidence.[17]

1. He ignored the fact that Frazer was frequently late by a substantial amount of time.

Approximately one-half of Frazer's latenesses were by more than fifteen minutes. Moreover, on several occasions Frazer was late by one-half hour or more. In fact, on one occasion she was late by over two hours (A. 387).

2. He ignored that fact that Frazer was on notice that her tardiness could result in termination.

Frazer knew that punctuality was a serious matter at River Manor. Frazer testified that Harrington told her, the day she was hired, that she was expected to be on the floor, working by twelve (A. 415a-416). Similarly, River Manor's Personnel Policies, copies of which Frazer admitted having received, not only stresses the importance of punctuality but also enumerates "continual lateness" as a ground for "immediate discharge" (A. 965, GCX 27). Thus, she was on notice as to the importance of reporting to work on time and that failure to report on time could result in her immediate termination (A. 852).

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[17] The Judge sought to minimize the seriousness of Frazer's lateness by stating that great numbers of employees were late, and that some employees with long records of lateness were not employed the same amount of time as Frazer (A. 21-22). However, Frazer's situation was far worse than any other employee and thus not comparable (see infra p. 25).

Additionally, the record evidence shows that Ethel Russell, upon the direction of Elsie Harrington, spoke to Frazer in December about trying to be on time (A. 727-728, 821).[18] Russell warned Frazer a second time in early January (A. 728) explaining that if the warnings went unheeded necessary action would be taken (A. 711).[19]

In addition to the two specific warnings given to Frazer, both Harrington and Russell testified that Harrington gave a speech to all employees on the night shift about punctuality (A. 834). This meeting serves as yet another instance of notice to Frazer that tardiness would not be tolerated at River Manor.

All of the preceding instances of warnings and notice to Frazer were ignored by the Judge.

3. The Judge ignored the fact that Frazer's lateness was at its worst in the period immediately preceding her discharge.

Frazer admitted that in the two week period immediately preceding her discharge she was late for work all but two days (A. 395).

In fact, the numerous attempts to get Frazer to report to work on time were totally without effect. Frazer's utter disregard of her work hours coupled with her disinclination or inability to remedy her tardiness were clearly established by the record.

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[18] Harrington knew which employees were late as a result of her daily review of the Aide Sign In Book (A. 728, 772).

[19] Frazer admitted that she was warned about getting to work on time (A. 416) but claimed that the warning occurred in November (A. 445). After extensive cross-examination, and after being confronted with her affidavit, Frazer admitted that she was first warned in December (A. 459). On rebuttal, Frazer conceded that she may have been warned on other occasions as well (A. 966). In view of the inconsistencies in Frazer's testimony, her version of the warnings cannot be credited.

Frazer last worked on January 8, 1975.[20] When Harrington reported to work on the morning of January 9th and discovered that Frazer had again reported late to work, she decided to discharge Frazer. That morning, January 9th, Harrington telephoned Frazer and told her that she had been late so much that she had decided to discharge her. Frazer merely said alright. There was no mention of any union activities (A. 773).

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[20] Frazer's application for employment (A. 72), the Aides Sign in Book (GCX 23), and the testimony of Elsie Harrington, establish that Frazer's last day of work was January 8, 1975 (A. 773). Nonetheless, disregarding the substantial evidence on the record, the Judge adopted Frazer's claim that she was not discharged until January 10, 1975. There are several reasons why it was erroneous for the Judge to credit Frazer. First, Harrington testified that when she came in on the *morning of the 9th* and noticed that Frazer had once again been late, she immediately called Frazer. Harrington told Frazer that since she did not seem to be able to make it to work on time Harrington had decided to discharge her (A. 773). Second, other witnesses testified that Frazer had been fired on the 9th. Terrell testified that as of January 12, 1975, Frazer had been fired several nights previously (A. 586-587). Similarly, Alma Robinson, a witness called by General Counsel, testified that Frazer was discharged prior to the time that she signed a card for Local 144 (A. 470). Robinson's 144 card (A. 84) is dated January 9, 1975.

It is evident that the Judge rested his finding on conjecture and speculation, rather than on the Record Evidence presented. The Judge concluded that since Frazer's fellow employees and a Local 144 representative did not know of Frazer's discharge on the night of January 9, Frazer must have been discharged the following day (A. 21). However, Frazer, the other employees, and Local 144 all knew that once card solicitation for Local 144 commenced, disciplinary action by the Home would be suspect. Thus, it was in the interest of all not to reveal the fact that Frazer had been discharged. Moreover, contrary to the Judge's finding, it is entirely plausible that Frazer failed to inform these people of her discharge. Her reason for not telling them was obvious. Frazer spoke with a New York State Labor Board agent and had reason to believe that she could utilize subsequent organizing activity as a subterfuge to conceal the real reason for her discharge.

In any event, the fact remains that the Judge ignored concrete record evidence in holding that Frazer was fired on January 10. Accordingly, his finding was not based on substantial evidence viewing the Record as a whole and thus cannot be sustained.

4. The Judge ignored the fact that Frazer provided no legitimate excuse for her tardiness.

Frazer admitted that there was no single reason which could account for her habitual lateness nor could she explain, on a day-by-day basis, the reasons for her lateness.[21]

In attempting to minimize the seriousness of Frazer's lateness by comparing her situation with other employees, the Judge totally ignored the fact that these other employees either had legitimate excuses for their lateness (A. 877-878), or terminated their employment before discharge action could be taken (A. 883).

5. The Judge ignored the fact that Frazer's lateness record was the worst in the facility.

The uncontraverted record evidence establishes that, for the period of her employment, no other employee was late as frequently as Frazer (A. 852).

b. *River Manor was unaware of Frazer's Union activities at the time of her discharge on January 9, 1975.*[22]

On January 7, 1975, it was established by the Record that employees Frazer, Williams and Hazell engaged in

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[21] On direct examination, Frazer sought to blame her lateness on being called in to work on days she was not scheduled (A. 446-447). When first questioned, Frazer claimed she was being called in "almost once a week" (A. 447). However, after extensive cross examination, Frazer admitted that she had been called in only three times (A. 449). Assuming, *arguendo* that Frazer was called in three times, it does not follow that she was late on those three occasions as Frazer acknowledged that she was notified prior to the commencement of the shift each time. In any event, one indisputable fact remains, an overwhelming majority of Frazer's latenesses remain unexplained.

[22] Even assuming *arguendo* that Frazer was discharged on the 10th and not on the 9th the record is devoid of any evidence that

conversation about Local 144. During that conversation it was decided that Frazer would telephone the New York State Labor Board (hereinafter the "State Board") the next day (January 8). The conversation between Frazer, Hazell and Williams occurred on working time while Russell was on duty. However, Russell neither participated in or knew about the substance of the conversation (A. 366).[23]

Nothwithstanding the above, there is not a scintilla of record evidence which establishes that Russell, or any other alleged agent of River Manor, knew of any union activity on Frazer's part in the period preceding her discharge on January 9, 1975.[24] The Judge cites no record evidence in his decision. Moreover, as Frazer was dis-

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Respondent Employer had knowledge of Frazer's union activity. Although Hazell attempted to buttress Frazer's activity by testifying that she (Frazer) had solicited cards on the night of the 9th, Frazer admitted, during cross-examination, that she did not solicit any cards on the night of the 9th. Contrarily, Frazer testified that she was on her day off, visited the Home briefly and left without anyone from management knowing she was there.

[23] Frazer's testimony does not establish the precise date on which each of the foregoing events occurred. However, Albert Hazell's testimony clarifies the dates for each event. Hazell testified that he spoke with Frazer on January 9, 1975, two days after he, Frazer and Williams agreed that Frazer would call the State Board (A. 218). Therefore, it was agreed that Frazer would call the State Board on the 7th and Frazer made the call on the 8th.

[24] Frazer claimed to have talked with other employees about Local 144 prior to the evening, January 7, that she agreed to call the State Board (A. 313). Such a contention is unsupported by the Record Evidence. It was only as a result of the January 7 conversation that Frazer was induced by Williams, a former 144 member, to call the State Board (A. 525). Additionally, no other evidence, other than her own self-serving testimony, was introduced to link Frazer to Local 144 prior to January 7.

However, even assuming *arguendo* that Frazer had discussed Local 144 with other employees prior to January 7, there is not a shred of record evidence to support an inference that River Manor knew of such discussions.

charged on the morning of January 9th, none of the union activity which Frazer was allegedly involved in later that day could have been a factor in Frazer's discharge. Ethel Russell testified that she had no knowledge of Frazer's union activity (A. 696).

c. *The leading proponent for Local 144 was not discharged.*

Another factor negating the conclusion of discriminatory motivation, ignored by the Judge, is the fact that other persons, admittedly pro-Local 144, were not discharged.

Thus, Williams, a most active proponent of 144 (A. 563)[25] remains in River Manor's employ.

As the Fourth Circuit has recently pointed out, when a discriminatory discharge is alleged, in determining whether substantial evidence on the record considered as a whole supports the Board's determination, the fact that other employees more openly active than the discharged remain in the Employer's work force must be given weight. (*Winn-Dixie Stores, Inc.* v. *NLRB,* 448 F.2d 8 (4th Cir. 1971).[26]

Thus, the fact that Williams was not discharged nor even reprimanded negates the Board's conclusions that River Manor discharged employees for their Local 144 activity. Rather, it indicates that the sole motive behind Frazer,

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[25] In fact, it was Williams who first suggested Local 144 (A. 525) during the conversation that the Judge erroneously used to propound his theory that Russell relayed the group's union activity to top management. If so, why wasn't Williams also fired?

[26] Also noteworthy is *Reactive Metals, Inc.,* 134 NLRB 1190, 1198 (1961), where the Board dismissed a complaint that the employee in question was discharged in violation of the Act, relying on the fact that "... other employees who were similarly engaged in union activity were not discharged."

Terrell and Hazell's discharges were legitimate business reasons.[27]

B. Contrary to the Board's Conclusion, Albert Hazell's Union Activities Were Not Shown to be a Factor in His Discharge.

The Board held that the Employer violated Sections 8(a)(1) and (3) of the Act by discharging Albert Hazell on January 13, 1975 (A. 24). A review of the entire record demonstrates that substantial evidence does not exist to support such a finding.

1. Viewing the entire record, substantial evidence does not support the finding that Hazell was discharged because of his union activities.

The record evidence establishes that the first time that Hazell or any other employee discussed Local 144 was January 7, 1975. Hazell was discharged on January 13. The record is devoid of any evidence establishing that managerial or supervisory employees had knowledge of Hazell's union activities for the period of January 7 through January 13.

Between January 7 and January 9, the only record evidence of Hazell's activities concerns a meeting Hazell and others had while on shift on the 7th. There is no record evidence that anyone other than the participating employees had knowledge of the substance of this conversation.[28]

On January 9, at about 11:30 P.M., Hazell, and later Frazer, met with a Local 144 business representative out-

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[27] As stated by the Second Circuit in *NLRB* v. *Milco, Inc.*, 288 F.2d 133, 138 (2d Cir. 1968), "It is . . . clear that a discharge for some appropriate reason is not rendered unlawful merely because the Employer suffers no sorrow at the departure of a union man."

[28] As discussed *supra*, p. 26, LPN Russell was on the floor at the time but did not participate in the discussion.

side the facility (A. 262). Hazell was given Local 144 authorization cards. There is no record testimony that Hazell was observed with the business representative or that anyone else in the facility subsequently learned of this covert meeting.

Hazel testified that from January 10 (12:00 A.M.) until his discharge, he solicited union authorization cards (A. 221, 223-225). There is no record evidence which establishes that managerial or supervisory employees had knowledge of Hazell's actions.[29] Moreover, the Judge's categorization of Hazell's actions as "an open pattern of union activity" draws no support from the record evidence.[30]

The foregoing establish that at the time of Hazell's discharge, none of his union activities were known by managerial or supervisory employees of River Manor.

2. *Several compelling business reasons led to Hazell's discharge.*

The record establishes that the reasons advanced for Hazell's discharge were, viewed in their entirety, concrete and compelling.

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[29] Hazell solicited LPN Russell (A. 275-276). This is the sole basis upon which the Judge concluded that the Employer had knowledge of Hazell's union activities. Such a position is untenable for several reasons. First, there is no record evidence indicating that Russell informed Harrington or anyone else of Hazell's solicitation. Second, as discussed at length, *supra*, substantial evidence considering the record as a whole does not support the Judge's subjective and conjectural conclusion that LPNs were "a source of information for River Manor" concerning employees union activities.

As noted by the Eighth Circuit in *NLRB* v. *Red Top, Inc.*, 455 F.2d 721, 725 (8th Cir., 1972) "The inference that the discharge was motivated by participation in activities protected by the Act must be based on evidence, direct or circumstantial, and *not upon mere suspicion*".

[30] Hazell's solicitations may have been extensive, but they were not open and notorious (A. 223-225).

Albert Hazell commenced his employment with River Manor September 19, 1974, as an orderly, on the midnight to 8:00 A.M. shift (A. 205, 269, 776). Hazell was not hired on a permanent basis. Elsie Harrington testified that when she interviewed Hazell for the position of orderly, Hazell informed her that he could not work five consecutive days, due to other pressing obligations.[31] Ordinarily employees are given consecutive days off (A. 777). Harrington and Hazell agreed to a compromise: Hazell was given "split days" off but was hired on a temporary basis (A. 776).[32] To effectuate the compromise, Harrington was forced to split days off for other aides and orderlies (A. 779). Subsequently, numerous aides and orderlies complained about losing their consecutive days off (A. 779).

During the early period of his employment, Hazell was considered a very good worker (A. 74-75). However, with the passage of time, Hazell exhibited a lack of concern for his job. Hazell's negligent and indifferent attitude, combined with the problems created by his split days off, resulted in his discharge on the morning of January 13, 1975 (A. 779). The uncontradicted testimony of Harrington establishes that Hazell was, in the period immediately preceding his discharge, frequently late (A. 778, 848-849).[33] During that same time period, Harrington, on numerous

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[31] Hazell was attending school at nights. His class schedule was such that he had to have Mondays and Wednesdays off (A. 206).

[32] That Hazell was hired on a temporary basis was confirmed by the notation on his application form "Temporary" (A. 74). All other employees of Respondent Home, whose applications were placed into evidence, were hired on a trial basis and their applications bear that notation (A. 72, 76).

[33] The Aide Sign In Book indicates that Hazell worked thirty-one nights between December 1, 1974 and January 12, 1975. He reported to work after midnight on ten occasions and between 11:58 p.m. and midnight five times. Thus, for the last month and one half of his employment Hazell was late approximately fifty percent of the time (GCX 23).

occasions, personally observed Hazell talking to other employees, rather than attending to patients (A. 778, 843-844).[34]

When Harrington reported to work on the morning of January 13, 1975, she observed Hazell talking to employees, ignoring his tasks.[35] Harrington called Hazell in to her office and discharged him (A. 780, 846).[36]

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[34] Harrington did not know the substance of the conversations (A. 778). As noted by the Fourth Circuit in *Winn-Dixie Stores, Inc.* v. *NLRB,* supra, the mere fact that an Employer complains that a discharged individual has spent too much time conversing with other employees on the job will not support a Board inference that the Employer therefore was aware of union activities by the individual.

[35] Hazell never denied being late for work or talking to fellow employees during working time, rather, he merely denied being criticized for those actions (Tr. 1464-65).

[36] Harrington had no knowledge of Hazell's activities prior to his discharge (A. 780). In fact, as soon as Hazell entered Harrington's office he started ranting and raving that he was called in on account of his activities on behalf of Local 144. When Harrington told Hazell she did not know about his activities Hazell became further enraged, got up and started to leave. Harrington told Hazell that he was hired on a temporary basis and that he was being discharged (A. 780).

Hazell's version of his termination interview is in some respects identical to Harrington's. Thus, Hazell testified: that Harrington told him he was a temporary employee (Tr. 257); that Harrington denied knowing anything about unions (Tr. 257); and that Hazell ended the conversation by getting up and leaving (Tr. 258, 321). According to Hazell, the first words out of Harrington's mouth were that because of his Local 144 activities, he was being discharged (Tr. 257). This portion of Hazell's account of his discharge is spurious. Clearly, Hazell was a biased witness who had every motive to fabricate testimony. Furthermore, Hazell was an intelligent man who, after his meeting with the State Board agent, knew exactly what statements would best serve his interests. It is respectfully submitted to this Court that within the framework of an honestly depicted occurrence Hazell injected self-serving testimony. Accordingly, the testimony of Hazell should not be credited.

C. Mary Terrell Was Discharged Solely Because of Her Poor Work and Poor Attitude.

The Board found that River Manor, by its discharge of Mary Terrell, had violated Sections 8(a)(1) and (3) of the Act. It is respectfully submitted to this Court that substantial evidence on the record as a whole does not support such a finding. Rather, the evidence establishes that Terrell was discharged solely because of incompetence, insubordination and sloppiness and that Terrell's union activities were unknown to River Manor.

1. *Terrell was discharged on account of her poor work and poor attitude.*

Mary Terrell commenced employment as a nurse's aide, on a trial basis, on December 4, 1975 (A. 76, 782). The record establishes that Terrell was discharged on January 13, 1975 because of numerous incidents of incompetence and indifference exhibited during the short term of her employment.

Elsie Harrington, Director of Nurses, testified that while making rounds she observed Terrell at work and that Terrell was a "very poor worker" who did not give proper patient care (A. 782, 838, 841). Specifically, Terrell inadequately "dressed them, bathed them, kept them clean" (A. 782).[37]

2. *The Board's conclusion that Terrell was discharged because of her Union activities is not supported by substantial evidence.*

On January 12, 1975, Harrington telephoned Terrell and informed her that her services were being terminated (A.

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[37] During the brief period of Terrell's employment, she was observed by Harrington giving poor patient care over ten times (A. 839).

783, 927).[38] The uncontradicted evidence establishes that Terrell was fired for justifiable reasons and that her discharge was in no way motivated by her union activities.

a. *Terrell was told, at the time of discharge that the reason was poor work.*

Elsie Harrington testified that she told Terrell over the telephone that the reason for her discharge was Terrell's unsatisfactory work and her sloppy appearance (A. 763, 849-850). The telephone conversation ended with Terrell stating "all right" (A. 763, 850).[39]

Additionally, Terrell's personal appearance was unkempt. Terrell was untidy about herself, her hair and her clothing (A. 782). Harrington observed that she saw Terrell in such an unkempt condition "practically every day" (A. 839).

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[38] The Judge noted that Harrington never warned Terrell prior to discharging her (A. 25). Harrington readily admitted that she did not tell Terrell that she was going to be fired prior to the time she terminated Terrell (A. 838, 843). However, this in no way infers that her discharge was for reasons other than cause. First, Harrington testified that it was not her practice to "threaten" employees with discharge (A. 838). Second, although she did not "threaten" Terrell with discharge, Harrington testified that she had spoken to Terrell about her work deficiencies on several occasions (A. 840-841). Third, River Manor's Personnel Policies (GCX 27), a copy of which Terrell admitted having received, specifies various grounds for immediate discharge including insubordination. Further, an entire section of the Personnel Policies is devoted to personal appearance. Accordingly, even if, assuming *arguendo*, Terrell was not spoken to by Harrington, Terrell was on notice that she could be terminated on account of her poor work, unkempt appearance and bad attitude.

[39] Both Frank McKinney, business representative for Local 144, and Terrell substantiated Harrington's account of the conversation. McKinney testified that Terrell called him a few days after her discharge and told McKinney that Harrington told her that the reason for her discharge was her substandard work (A. 649). Similarly, Terrell testified that Harrington stated that her dissatisfaction with Terrell's work was the reason for the discharge (A. 588, 927).

Similarly, Terrell evidenced a poor attitude about her work. Harrington described her attitude as "snippy" because when spoken to, Terrell responded with a quick retort or snippy answer (A. 782, 839-840).[40]

Ethel Russell, the only LPN assigned to the 12:00 A.M. to 8:00 A.M. shift during the term of Terrell's employment, was involved in an incident with Terrell in early January, 1975. Although ordinarily Terrell would commence work at eight o'clock she was assigned to report for the seven to eight shift the morning of the incident. Aides assigned to the seven to eight shift were to report to the nurse's office for floor assignment (A. 699). Russell testified that Terrell did not first report to the office and that when Russell asked her if she wanted to be told her floor assignment, Terrell stated "I don't have to take orders from you" (A. 698, 734). Russell said nothing further and walked away from Terrell.[41] Shortly thereafter, Russell related the incident to Harrington (A. 699).[42]

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[40] In upholding an Employer's discharge for insubordination, the Fourth Circuit recently wrote in overturning the Board's finding of a discriminatory discharge "that insubordination and refusal to obey instructions constitute reasonable grounds for disciplining an employee, and discharge for insubordination or refusal to obey instructions is perfectly lawful. *NLRB* v. *Consolidated Diesel Electric Company*, 469 F.2d 1016, 1025 (4th Cir., 1972).

[41] Harrington's recollection of the incident is virtually identical to Russell's (A. 841). Terrell denied that the incident occurred (A. 622, 923, 1434). Harrington's and Russell's account of the incident should be credited and Terrell's denial not believed. In the first place the record evidence amply demonstrates that Harrington's and Russell's testimony was candid, unevasive and unimpeached. Moreover, Harrington and Russell were disinterested witnesses who had no motive to fabricate or distort incidents. That Harrington's and Russell's accounts of the incident are substantially identical is yet further proof of their veracity. Terrell, on the other hand was not a disinterested witness and her testimony concerning the incident is clearly self-serving.

[42] That the foregoing were the reasons for Terrell's discharge was documented by the comments entered on Terrell's application

b. *Terrell's activities on behalf of Local 144 were unknown to management.*

The uncontradicted record testimony of Harrington, Russell and Terrell make it abundantly clear that Terrell's union activities were unknown to management at the time of her discharge. The Judge *totally ignored* this evidence. When asked whether she was aware of any union activity on the part of Terrell, Elsie Harrington responded "No" (A. 783). Likewise, Ethel Russell testified that she had no knowledge of Terrell's activity in support of Local 144 (A. 698). The last and perhaps most persuasive evidence of River Manor's lack of knowledge of Terrell's union activities is Terrell's own statement to that effect. Terrell testified that to her knowledge no one from management knew of her union activities (A. 621).[43]

D. The Board's Finding That the Discharges of Employees Brenda Frazer, Albert Hazell, and Mary Terrell Were Discriminatory Is Contrary to Court Precedent.

It is respectfully submitted to this Court that the decision of the Board finds no substantial support in the Record considered as a whole and thus, it cannot be enforced. As noted, supra p. 19, the Act does not insulate employees from discharge. It is only when antiunionism is the motive for the discharges that the Act is violated.

As recognized by this Court many times, in order for the General Counsel to have met his burden of proving an

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form by Harrington following Terrell's discharge (A. 76-77). The entry cites Terrell's poor work, untidiness, snippy attitude and insubordination as the reasons for her discharge.

[43] The Judge concluded that the Employer had knowledge of Terrell's union activities because Terrell had discussed Local 144 with LPN Pierre. This conclusion was tenuously premised on Pierre's knowledge of Terrell's activities. Here, too, the Judge bases liability upon a theory unsupported by substantial evidence and contrary to established Court precedent. See p. 29 supra.

unlawful discharge he must at least have provided "a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one." *NLRB* v. *L.E. Farrell Company,* 360 F.2d 205, 208 (2nd Cir., 1966); *NLRB* v. *Park Edge Sheridan Meats, Inc.,* 341 F.2d 725, 728 (2nd Cir., 1965). We respectfully submit that the permissible ground alone would have led to the discharges of Terrell, Frazer, and Hazell and such a contention is amply supported by the substantial evidence on the record taken as a whole.

1. *The lack of substantial evidence is clear.*

This Court, when ruling upon the Board's findings of fact, must determine whether the evidence, viewing the record as a whole, substantially supports the Board's findings. Administrative Procedure Act, 5 U.S.C. Section 706 (1970). The standard of review laid down for the Court in cases such as this was explained in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490 (1951). Therein, the Supreme Court reversed and remanded an order of the Board that had found an employee to have been discharged for giving testimony in a prior case. Reviewing both the history of the Administrative Procedure Act and the Taft-Hartley Act, the Court stated in part:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act directs that *courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past.* Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. *Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds.* That responsibility is not less real because it is limited to

> enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informal judgment on matters within its special competence or both."

In summary, that there be merely enough favorable evidence to convince a reasonable man that the facts are true is not sufficient. Instead, the favorable evidence must be such that viewing the record as a whole, including the contrary evidence, the findings of fact are supported by substantial evidence.

Thus, it is respectfully submitted that when this Court reviews *all* the evidence, including the contrary evidence, it will find that there is not enough evidence to support the Board's findings of fact that Frazer, Hazell, and Terrell were discriminatorily discharged for their union activity.

CONCLUSION

The Board has failed to establish that the actions and conduct of LPNs Mercado, Russell and Link should lawfully be attributed to River Manor.

Additionally, the Board has wholly failed to establish that employees, Frazer, Hazell and Terrell were discharged for reasons other than cause.

Wherefore, for all of the foregoing reasons, which illustrate that the Board's Order is not supported by sub-

stantial evidence, the Employer respectfully requests that it be set aside and that enforcement be denied.

Respectfully submitted,

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Of Counsel:

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LYNN C. OUTWATER

Dated: New York, New York
April 29, 1977

AFFIDAVIT OF SERVICE BY MAIL

State of New York,
City of New York,
County of New York, ss.:

ALFRED BUSH, JR., being duly sworn, deposes and says that he is over 18 years of age. That on the 29th day of April, 1977, he served 3 copies of Brief on Behalf of Respondent upon:

MICHAEL S. WINER
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

By depositing 3 copies of the same securely enclosed in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Canal & Church Streets, N.Y.C., addressed to said attorney for the above named, that being the address within the state designated by them for that purpose upon the preceding papers as the place where they regularly kept office and at which place they regularly received mail.

Sworn to before me this
29th day of April, 1977

Sylvia Morris

SYLVIA MORRIS
Notary Public, State of New York
No. 31-4526651
Qualified in New York County
Commission Expires March 30, 1978

Alfred Bush Jr.
ALFRED BUSH, JR.

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